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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 THE ESTATE OF JOLENE  
9 LOVELETT,

10 Plaintiff,

11 v.

12 UNITED STATES OF AMERICA, et  
13 al.,

14 Defendants.

CASE NO. C16-5922 BHS

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS, DECLINING  
SUPPLEMENTAL JURISDICITON,  
AND DISMISSING REMAINING  
CLAIMS WITHOUT PREJUDICE

15 This matter comes before the Court on Defendant United States of America's  
16 ("Government") motion to dismiss (Dkt. 172). The Court has considered the pleadings  
17 filed in support of and in opposition to the motion and the remainder of the file and  
18 hereby grants the motion for the reasons stated herein.

19 **I. PROCEDURAL HISTORY**

20 On November 1, 2016, the Estate of Jolene Lovelett ("the Estate") filed a  
21 complaint against multiple defendants, including individual Defendants Nancy Dufraine,  
22 Heather Hoyle, Kelsie Moen, RN, and Trisha Shipp, LPN ("Defendants"). Dkt. 1. The  
Estate asserts claims for violations of 42 U.S.C. § 1983; violations of Washington's

1 Abuse of Vulnerable Adults Act (“VAS”), RCW Chapter 74.34; and the “common law  
2 torts under Washington law, including assault, battery, negligence, neglect, abandonment,  
3 outrage and infliction of emotional distress.” Dkt. 1.

4 On March 3, 2017, the Government filed a notice of substitution giving notice that  
5 the Government would be substituting as defendants for all “common law tort[s]”  
6 asserted against Defendants. Dkt. 39. On May 1, 2017, the Court granted the  
7 Government’s motion to dismiss. Dkt. 54.

8 On March 15, 2018, Defendants filed a joint motion for summary judgment. Dkt.  
9 93. On March 22, 2018, the Estate filed a motion for partial summary judgment. Dkt.  
10 106.

11 On May 14, 2018, the Court granted the parties’ motion to dismiss the Tribe. Dkt.  
12 152.

13 On June 11, 2018, the Court granted Defendants’ motion for summary judgment  
14 and dismissed the Estate’s 42 U.S.C. § 1983 claims. Dkt. 162. The Court also requested  
15 responses on the issue of exercising supplemental jurisdiction because it appeared that all  
16 the federal claims had been dismissed. *Id.* at 10. The remaining parties responded. Dkts.  
17 166, 168.

18 On June 19, 2018, the Court requested a response from the Government explaining  
19 why the Government substituted itself for some state law claims, but not all the state law  
20 claims. Dkt. 169. On June 22, 2018, the Government responded. Dkt. 170. The  
21 Government also filed a new notice of substitution and motion to dismiss. Dkts. 171,  
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172. On June 29, 2018, the Estate responded to the motion to dismiss. Dkt. 173. On July 20, 2018, the Government replied. Dkt. 174.

## II. FACTUAL BACKGROUND

The relevant facts are set forth in the Court’s previous order, Dkt. 162, and the Estate’s motion for partial summary judgment, Dkt. 106. The Court finds no need to repeat those facts in this order.

## III. DISCUSSION

### A. Motion to Dismiss

The United States of America is subject to suit only to the extent that it has waived its sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 813-814 (1976).

Because “[s]overeign immunity is jurisdictional in nature . . . the terms of the United States’ consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (internal citations omitted). The Federal Tort Claims Act (“FTCA”) waives sovereign immunity for certain tort suits against the United States for injuries caused by federal employees under circumstances where a private person would be held liable, “in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. §§ 2674, 2679(b)(1) and 1346(b). The FTCA, as a limited waiver of sovereign immunity, is strictly construed, and all ambiguities are resolved in favor of the sovereign. *See Lane v. Pena*, 518 U.S. 187, 192 (1996).

The FTCA empowers the Attorney General to certify that a federal employee sued for wrongful or negligent conduct “was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. §

1 2679(d)(1). Upon such certification, the action “shall be deemed an action against the  
2 United States under the provisions of [the FTCA], and the United States shall be  
3 substituted as the party defendant.” *Id.*; *see also Walker v. Chugachmiut*, 46 Fed. Appx.  
4 421, 424 (9th Cir. 2002) (citation omitted) (“Once certification is given in a civil action,  
5 the [FTCA] mandates . . . substitution of the United States as the defendant.”). “The  
6 Attorney General’s decision regarding scope of employment certification is conclusive  
7 unless challenged.” *See Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993) (citing 28 U.S.C.  
8 § 2679(d)(1)–(4)).

9 In this case, the Estate raises several objections to the Government’s substitution  
10 and motion to dismiss, but none of them withstand scrutiny. First, the Estate’s best  
11 argument is that its VAS claims fall outside of the FTCA based on the exception for  
12 “[a]ny claim arising out of assault, battery, false imprisonment . . . .” 28 U.S.C. §  
13 2680(h). Upon review of the briefs, both parties seem to miss the mark on this argument.  
14 Contrary to some arguments, the problem is not whether the VAS claims are tort claims  
15 under state law. VAS claims are rather straightforward claims for personal injuries based  
16 on either negligent or intentional conduct. Thus, the issue is whether the individual  
17 defendants were acting within the scope of their employment when the violations based  
18 on intentional conduct occurred. The Government has certified that they were, and the  
19 Estate has challenged this certification. The Estate’s challenge, however, is completely  
20 undermined by its complaint. In the complaint, the Estate alleges that the Defendants  
21 were acting within the scope of their employment at all material times. *See, e.g.*, Dkt. 1,  
22 ¶ 10 (“All acts and omissions of defendant Fadele were done under color of federal and

1 state law and under the authority of her position as an agent/employee/subcontractor with  
2 the Chehalis Tribal Wellness Center.”). Thus, the Estate fails to even allege acts that  
3 were committed outside the scope of employment.

4 Even if one ignored the relevant allegations in the complaint, or lack of relevant  
5 allegations, the Estate has failed to meet its burden by a preponderance of the evidence.  
6 “In determining whether a United States employee acted within the scope of his or her  
7 office or employment . . . , we apply the respondeat superior principles of the state in  
8 which the alleged tort occurred . . . .” *Green*, 8 F.3d at 698–99. In Washington, “[a]n  
9 employee’s conduct will be outside the scope of employment if it ‘is different in kind  
10 from that authorized, far beyond the authorized time or space limits, or too little actuated  
11 by a purpose to serve the master.’” *Robel v. Roundup Corp.*, 148 Wn.2d 35, 53 (2002)  
12 (quoting Restatement (Second) of Agency § 228(2) (1958)). “The proper inquiry is  
13 whether the employee was fulfilling his or her job functions at the time he or she engaged  
14 in the injurious conduct.” *Id.* “[W]hen a servant ‘steps aside from the master’s business  
15 in order to effect some purpose of his own, the master is not liable.’” *Id.* (quoting *Kuehn*  
16 *v. White*, 24 Wn. App. 274, 278 (1979)).

17 In this case, the Estate has failed to assert allegations or cite evidence establishing  
18 that any relevant defendant stepped aside from the Chehalis Tribal Wellness Center’s  
19 business to effect some purpose of her own. Instead, the Estate’s motion for summary  
20 judgment details medical neglect and failure to report abuse. Dkt. 105 at 5–13. While  
21 the facts are tragic, the evidence of intentional and negligent medical mistreatment  
22 establishes that the employees were acting within the scope of their employment at all

1 relevant times. Therefore, the Court concludes that the Estate has failed to establish by a  
2 preponderance of the evidence that the Government's certification is incorrect.

3 Second, the Estate argues that the Government should be estopped from  
4 submitting a second notice of substitution. This argument fails for numerous reasons,  
5 including the fact that the Government has not taken clearly inconsistent positions. If  
6 anything, the Government's second notice is simply a clarification of its first notice and  
7 not inconsistent with its first notice. Thus, the Estate's argument on this issue fails.

8 Finally, the Estate argues that, even if the VAS claims fall within the FTCA, it  
9 exhausted its claims. Dkt. 173 at 8–9. The Court has previously disagreed with this  
10 argument in concluding that the Estate failed to set forth a sum certain in its  
11 administrative claim. Dkt. 54 at 2–3. The Estate fails to persuade the Court that its  
12 conclusion is in error. Therefore, the Court concludes that the Government properly  
13 substituted for Defendants and the Estate failed to exhaust. Accordingly, the Court grants  
14 the Government's motion to dismiss the Estate's VAS claims against Defendants.

## 15 **B. Supplemental Jurisdiction**

16 The district courts may decline to exercise supplemental jurisdiction over a claim  
17 if the claim raises a novel or complex issue of state law or when the district court has  
18 dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367.

19 In this case, both contingencies are satisfied. The Court has dismissed all of the  
20 Estate's federal claims that established jurisdiction. The Estate's remaining claims  
21 involve complex and novel issues of state law that are best left to the state courts.  
22 Therefore, the Court declines to exercise supplemental jurisdiction.

1 **IV. ORDER**

2 Therefore, it is hereby **ORDERED** that the Government's motion to dismiss (Dkt.  
3 172) is **GRANTED**, the Estate's VAS claims against Defendants are **DISMISSED with**  
4 **prejudice**, and the Estate's remaining state law claims are **DISMISSED without**  
5 **prejudice**. The Clerk shall enter a **JUDGMENT** and close the case.

6 Dated this 26th day of July, 2018.

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8 BENJAMIN H. SETTLE  
9 United States District Judge